

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SKYLER DAMON SMITH,

Defendant and Appellant.

G040886

(Super. Ct. No. INF046883)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County,
Richard A. Erwood, Judge. Affirmed.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Bradley Weinreb and
Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

Angry with his sister's boyfriend, defendant shot at him and was convicted of assault with a firearm. Defendant argues there was insufficient evidence to support the conviction, ineffective assistance of counsel, and prosecutorial misconduct. We find that none of these arguments have merit and therefore affirm the conviction.

I

FACTS

As of December 2003, defendant's sister, Racquelle Smith (Racquelle), was dating Victor Michael Mangione. Racquelle lived with her father, Damon Smith (Damon), as did her cousin, Dustin Paris. Mangione did not have a permanent home and sometimes stayed with Racquelle, leaving belongings there. Mangione was a user of methamphetamines, marijuana and alcohol.

On December 13, 2003, defendant, who lived with his mother in Oregon, arrived at his father's home for a visit. Later that day, Racquelle and Mangione were at the hotel room occupied by Mangione's mother when his younger sister was hit by a car. Damon came over and drove Mangione's mother and sister to a hospital, while defendant stayed with Racquelle and Mangione. Mangione and defendant had never met before, but they had spoken on the telephone. Defendant did not like Mangione because his father had told him that Mangione had hit Racquelle. During their phone conversation, defendant told Mangione that he would shoot him, and while in the hotel room, defendant and Mangione "exchanged a few words." Mangione saw bulges in defendant's waistband, and believed that he was armed. Racquelle told him that defendant had guns.

Later that day, after defendant had left, Racquelle called her father and asked if he would pick her up because Mangione had hit her. Damon did so, bringing Paris and defendant with him. Defendant knocked on the door, and when Racquelle answered, he demanded to know where Mangione was. Defendant was very angry, carrying a flashlight and with two guns strapped to his body. After exchanging angry words with Mangione's mother, defendant left.

Defendant, Paris and Damon found Racquelle and Mangione in front of the hotel. They surrounded Mangione. Defendant and Paris were carrying large flashlights. Mangione started to run and defendant chased him, throwing the flashlight at him. The flashlight hit Mangione on the back, causing large welts. Defendant lost sight of Mangione and returned to the rest of the group, who then returned to Damon's house.

Mangione called Racquelle later that night, and as he was talking to her, he heard a knock on her door that led him to believe another boyfriend of Racquelle's, called Boo, was there. He asked his mother's boyfriend, Paul Weber, to drive him to Racquelle's house to pick up some clothes and confront the other man. Mangione's 16-year-old brother also went with them. They did not have any weapons.

Weber parked across the street from Racquelle's house when they arrived. Racquelle was outside talking to Boo, and Paris and defendant were also outside. A confrontation ensued, with Mangione punching the window of Boo's car. As he was doing so, defendant ran out of the house, shooting a gun at Mangione and yelling, "Mike, I'm going to . . . kill you, you punk." As defendant was shooting, Mangione and his brother ran back to Weber's truck and got in. Defendant fired six shots, four of which hit Weber's front driver's door. The police were called once they returned to the hotel.

Defendant testified at trial in support of a self-defense theory. He stated that his father had told him bad things about Mangione and admitted hitting him with the flashlight, stating he was mad at Mangione. On the night of the shooting, he awoke to shouting, grabbing his loaded gun and running to the front door. He testified that he heard his father say that he, Damon, was going to kill Mangione. Defendant then ran outside and started shooting at the truck. He thought Mangione was in the front yard, and thought his father was fighting or that something was happening to him.

Defendant was charged with three counts, but the jury found him guilty only of assault with a firearm (Pen. Code, § 245, subd. (a)(2)).¹ The jury also found true that defendant intentionally discharged a firearm during the commission of the crime. (§ 12022.5, subd. (a).) His posttrial motions were denied. The court suspended a seven-year sentence and placed defendant on five years of formal probation.

II

DISCUSSION

Substantial Evidence

Defendant argues there was not sufficient evidence to find him guilty of assault with a firearm upon Paul Weber. Essentially, he claims that he did not know that Weber, or anyone, was in the vehicle, and as such, he could not be convicted of anything more than negligently or recklessly discharging a firearm.

“Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury’s verdict. [Citation.] By this process we endeavor to determine whether “‘any rational trier of fact’” could have been persuaded of the defendant’s guilt. [Citations.]” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) However, our review is not an empty exercise. The record must contain substantial evidence, “‘i.e., evidence that is credible and of solid value.’” (*People v. Jennings* (1991) 53 Cal.3d 334, 364.)

In *People v. Williams* (2001) 26 Cal.4th 779, our Supreme Court held that “assault does not require the specific ‘intent to cause any particular injury [citation], to severely injure another, or to injure in the sense of inflicting bodily harm [Fns. omitted.]’ Rather, assault required ‘the general intent to willfully commit an act the

¹ Subsequent statutory references are to the Penal Code.

direct, natural and probable consequences of which if successfully completed would be the injury to another.’ [Citation.]” (*Id.* at p. 784.) “Thus, ‘a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery.’ [Citation.]” (*People v. Hayes* (2006) 142 Cal.App.4th 175, 180.)

Viewing the evidence in the light most favorable to the judgment, the jury was under no obligation to believe defendant’s self-serving testimony that he was unaware that anyone was in the car when he started shooting. Weber, for his part, saw defendant, who was standing on the lawn or sidewalk directly across. The area was lit by a streetlight. Defendant also admitted that he recognized the vehicle as the one that had earlier picked up Racquelle, creating an inference that defendant was aware that someone on Mangione’s “side” of the dispute might be inside.

Even if he was unaware of Weber’s presence when he began shooting, the evidence does not support the contention that he remained ignorant. Mangione’s brother testified that he saw defendant firing at him as he was running toward Weber’s vehicle, and that defendant continued firing. Mangione also testified that defendant was still shooting even after he and his brother were back in the vehicle. Taken together, there was solid, credible evidence from which the jury could infer that defendant, as he fired his gun through a yard where four people were standing and running — knew that the bullets could strike someone, regardless of whether that person was his intended target. Thus, the evidence was sufficient to support the conviction.

Ineffective Assistance of Counsel

Defendant next claims that he received ineffective assistance of counsel, contending that his attorney was ineffective for requesting continuances, recommending that defendant accept a plea bargain, and failing to call expert witnesses. He also claims

his attorney was generally unprepared for trial and that his closing argument was inadequate.

“The standards for ineffective assistance of counsel claims are well established. ‘We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions.’ [Citation.]” (*People v. Prieto* (2003) 30 Cal.4th 226, 261.) “In order to demonstrate ineffective assistance, a defendant must first show counsel’s performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation] Second, he must show prejudice flowing from counsel’s performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.) If the defendant fails to establish either component by a preponderance of the evidence, the claim of ineffective assistance fails. (*People v. Harris* (1993) 19 Cal.App.4th 709, 714.)

We have reviewed the record extensively, and find no cognizable claim of ineffective assistance of counsel. We find no indication in the record that counsel’s request for continuances were based on a lack of preparation. Indeed, they seemed to have been primarily made due to discovery requests. Nothing else in the record points to a lack of preparation, including a well-founded recommendation to accept a plea bargain. Counsel made numerous motions, cross-examined witnesses, presented four defense witnesses and successfully defeated two of the three charges facing defendant.

Defendant claims that counsel was ineffective in defending against the assault charge specifically, which is convenient, considering that counsel successfully defended him against the other two counts.² Defendant’s claims with regard to expert

² The other counts included attempted murder (of Mangione) and criminal threats against Mangione’s mother, based on defendant’s acts in the hotel room.

witnesses all seem to relate to his claim about his lack of actual knowledge that Weber was in the vehicle, including his state of mind at the time and the lighting and layout of the crime scene. But as explained *ante*, his actual knowledge was not required, given the facts of the case. Defendant's argument about counsel's closing argument, similarly, is based on this issue. Taken together, as defendant demands, we find nothing to suggest that counsel's performance was deficient under prevailing professional norms. (*People v. Williams, supra*, 16 Cal.4th at pp. 214-215.) Indeed, the fact that defendant was acquitted on the other counts, demonstrates counsel's overall ability and competence.

Prosecutorial Misconduct

Defendant next claims that the prosecutor committed reversible misconduct when he left defendant's picture on the overhead projector during closing argument. Although the picture had been admitted into evidence and seen by the jury, defendant claims that it was intended to "demonize" him.

A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*Donnelley v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *People v. Hill* (1998) 17 Cal.4th 800, 819.) Misconduct by a prosecutor that does not render a criminal trial fundamentally unfair is error under state law "if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

The photo at issue here does not come close to approaching this standard. While the photo was admitted into evidence for a limited purpose, leaving it on the projector during closing argument did nothing to infect the trial with such unfairness as to deny defendant due process. Defendant does not point to any attempt by the prosecutor to use the photo as he suggests — as the trial court noted, the prosecutor did not say

“Look at him, he looks like a crook.” Further, the court did not find the photograph itself to be menacing. In short, we find nothing in the record to support the contention that the photograph, in and of itself, “demonized” defendant or jeopardized due process in this case.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.